

News

Honours

- **Elizabeth Koester**, a doctoral student at the University of Toronto, has been named this year's recipient of the R. Roy McMurtry Fellowship in Canadian Legal History. Also honoured by the Osgoode Society for Canadian Legal History is **Hakeem Yusuf** of Strathclyde Law School in the U.K., with the John T. Saywell Prize for constitutional legal history, and **Edward Cavanagh** of the University of Ottawa and **Tyler Wentzell**, graduate of the University of Toronto Law School, who share the Peter Oliver Prize recognizing writings in Canadian legal history.
- Personal injury lawyer **Alfred Kwinter**, co-founding partner of Toronto law firm *Singer Kwinter*, has received the Ontario Bar Association's Award for Excellence in Insurance Law for 2015. Also recognized with this year's award given to recognize contributions and achievements in insurance law is the late **Owen Smith** of *Smith McBride Ducharme* in New Liskeard, Ont.

Moves

- **David Allgood** has joined *Dentons Canada* as counsel, based in the firm's Toronto office. Allgood previously was executive vice-president and general counsel at RBC, a position he held from 2000 until April of this year.
- **Marc Adler** has joined *McMillan LLP* as counsel in the firm's Vancouver financial services group, and also in the firm's Calgary office. Adler was previously general counsel at GE Energy Financial Services. Also at *McMillan LLP*, Sunwah International president and CEO **Doug Betts** has joined the firm's Hong Kong office as a strategic advisor and later, as senior counsel, in the China practice group.

Mandatory minimums for gun crimes revived

Bill C-69 among volley of pre-election justice bills

CRISTIN SCHMITZ

The federal government has unveiled key planks of its fall election platform in a flurry of last-minute justice bills, including *Criminal Code* amendments to restore mandatory minimum penalties for gun crimes struck down by the Supreme Court just two months ago.

In the dying days of the 41st Parliament before its summer recess, Justice Minister Peter MacKay on June 16 tabled the sweeping *Dangerous and Impaired Driving Act* (C-73), a broad overhaul of the law which proposes mandatory minimum penalties (MMPs), consecutive sentencing and other stiff punishment for impaired driving.

He also tabled a bill to enact "protection against genetic discrimination" in the federal sphere (C-68) on June 9, and one day later introduced Bill C-69, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in R. v. Nur* — also known as the *Penalties for the Criminal Possession of Firearms Act*.

Bill C-69 would re-enact invalidated MMPs of three years' imprisonment for a first offence of possession of a loaded, or easily loaded, restricted or prohibited firearm, and five years' imprisonment for repeat offenders when convicted on indictment.

The proposed legislation was sparked by the Supreme Court's April 14 ruling in *R. v. Nur* [2015] S.C.J. No. 15, which struck down those penalties as contrary to the *Charter's* s. 12 ban of "cruel and unusual punishment."

The top court held 6-3 that the MMPs could lead to otherwise law-abiding gun owners being subjected to grossly disproportionate



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Derstine Penman

punishments for what are, in essence, licensing violations involving little or no moral fault, and little or no danger to the public.

Bill C-69 addresses that constitutional defect by stipulating that the MMPs would only apply where one of the following aggravating circumstances is proven beyond a reasonable doubt: (1) the firearm was possessed for the purpose of committing an indictable offence under the *Criminal Code* or the *Controlled Drugs and Substances Act*; or (2) the gun

possession created a real risk of harm to others.

If neither of these two circumstances is proven, no MMP would apply. The offence would still be punishable by up to the existing maximum penalty of 10 years' imprisonment.

Dirk Derstine of Toronto's Derstine Penman, who spearheaded the successful *Charter* attack in *Nur*, said Bill C-69 goes "some way" to addressing the top court's constitutional concerns, but "to what extent will be an open question."

"It's complicated," Derstine said. "Not in response to *Nur*, as far as I can tell, they've changed or weakened to an unknown extent the requirement that ammunition be 'readily accessible.'"

Bill C-69 does so by asserting that instead of being readily accessible, the ammunition must be "capable of being loaded into [the firearm] without delay. So who knows what that means?" Derstine said.

Similarly, he said it's not clear what is meant by committing the offence in a manner that "creates a real risk of physical or psychological harm to another person," which is one of the aggravating factors triggering an MMP. Moreover, a deeming provision stipulates that in the absence of evidence to the contrary, the offence is deemed to be committed in such a manner "if it is committed in a place where another person is present."

"That's not an absolute — [the defence] can prove it to the contrary," Derstine said. "But you might very well have a hard time proving it if that's the primary definition."

The deeming provision would also require courts, in the absence of evidence to the contrary, to

find that a real risk of harm to others exists if the offence was committed in, or next to, a school or other public place usually frequented by children.

The government says three scenarios are specifically excluded from the definition of the s. 95 *Criminal Code* offence:

- Law-abiding firearms owners who fully comply with the requirements of the *Firearms Act*, including being licensed and having a registration certificate, and who safely store their firearm and only load it in a place in which they are legally entitled to discharge it.

- A person uses a loaded firearm under the direct and immediate supervision of a person who is legally entitled to possess it, and is using it in a legal manner; and

- A person comes into possession of a firearm by operation of law, for example by inheritance, if they take steps, "within a reasonable period of time," to lawfully dispose of the firearm or to comply with the requirements of the *Firearms Act*.

Bill C-69 also expressly states that the common law rule of innocent possession applies to s. 95.

Other justice-related legislation the Harper government introduced in June includes the *Protection of Communities from the Evolving Dangerous Drug Trade Act* (C-70), and the *Victims Rights in the Military Justice System Act* (C-71).

Opposition parties slammed the government for tabling legislation which could never pass before Parliament's summer break and the federal election, but government House leader Peter Van Loan insisted his government was properly letting Canadians know what they can expect if the Conservatives are re-elected in October

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